United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-7288

IN THE

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FOR THE SECOND CIRCUIT

NATHAN CHANOFSKY,
Plaintiff-Appellant,

against

THE CHASE MANHATTAN CORPORATION,
Defendant-Appellee-Petitioner.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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Statement of Issues Presented for Rehearing

1. Did the Court misapprehend or overlook that on the clear state of the record plaintiff has waived his right to trial by jury in accordance with the provisions of Rule 39, Federal Rules of Civil Procedure?

2. If the Court is concerned that the District Court has prematurely formed its views on the factual questions, did the Court overlook that a better remedy is to recommend assignment to another judge rather than to ignore long-established principles under Rule 39?

Statement of the Case

Pursuant to Rule 40, Federal Rules of Appellate Procedure, defendant The Chase Manhattan Corporation ("Chase") petitions for rehearing on this Court's decision dated March 1, 1976, vacating and remanding the judgment of the United States District Court for the Southern District of New York (Duffy, J.). (101-110a*)

The nature of this action and the pertinent facts are fully stated in the Brief for Appellee dated September 24, 1975 and, therefore, are not restated here.

Facts Relevant to This Petition for Rehearing

The facts bearing on plaintiff's waiver of a jury trial are contained, for the most part, in the record and are not in dispute. The hearing in the District Court on

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* "a" refers to the Appendix.

Chase's motion for summary judgment was held on March 7, 1975. Early in the hearing, the Court inquired of Mr. Kaszovitz, counsel for plaintiff, whether the papers submitted on Chase's motion raised any issues of fact. Mr. Kaszovitz responded that there was no dispute on the evidentiary facts of market statistics, but that the intuitive knowledge of the trier of facts would be important in determining how they should be interpreted. In this context, the Court asked why plaintiff had filed a jury demand, to which Mr. Kaszovitz responded that he really did not know why he had demanded a jury, but that usually he files such a demand as a matter of course. (87-88a) Later, at the conclusion of argument on the motion, the Court inquired of counsel for both parties whether they consented to waive a jury trial. Mr. Kaszovitz consented on behalf of plaintiff (83a), and Mr. Jackson consented on behalf of Chase. (88a)

Subsequently, in an opinion dated March 24, 1975, the District Court entered judgment for Chase, observing with reference to the hearing that "[b]oth sides at that time decided to waive a jury." (101a) Thereafter, plaintiff made an untimely motion in the District Court for reargument, Mr. Kaszovitz stating in his affidavit in

support of the motion that "[i]t is true that I, as counsel for plaintiff, did, in reply to the Court's inquiry, agree to waive trial by jury." (83a) Plaintiff's motion for reargument was denied.

On appeal to this Court, plaintiff's counsel conceded that a jury trial was waived in the District Court, but argued that such waiver was not binding on plaintiff because it was not made in accordance with Rule 39 of the Federal Rules of Civil Procedure. (Plaintiff-Appellant's Brief, pp. 29-30) This Court acknowledged the parties' waiver of a jury trial below, finding specifically that "[d]uring the oral argument on the motion, plaintiff's attorney agreed to waive a jury." (Slip op., Mar. 1, 1976, p. 2) This Court went on to suggest, however, that in view of Judge Duffy's premature findings with respect to the factual questions to be tried, withdrawal of plaintiff's waiver should be permitted regardless of the merits of plaintiff's Rule 39 argument. (Slip op., Mar. 1, 1976, p. 4)

I

THE COURT OVERLOOKED OR MISAPPREHENDED THAT ON THE RECORD AND UNDER APPLICABLE PRINCIPLES OF LAW PLAINTIFF MAY NOT WITHDRAW HIS WAIVER OF A JURY TRIAL.

It is respectfully submitted that plaintiff should not be permitted to withdraw his waiver of a jury trial since such withdrawal is not required by this Court's disposition of the remainder of the appeal and since plaintiff is not in any event entitled to such a withdrawal under applicable legal rules.

The record clearly shows that Mr. Kaszovitz, by oral stipulation in open court, expressly waived his client's demand for a jury trial. Counsel for the parties agree that the waiver was made (83a, 88a), and both the District Court (101a) and this Court (Slip op., Mar. 1, 1976, p. 2) so found. Counsel for defendant joined in that waiver, and the consent of both parties to trial by the Court, without a jury, subsequently was entered in the record.

This Court did not decide the merits of plaintiff's argument that the waiver of a jury trial was not made in accordance with Rule 39.

Rule 39(a) provides in relevant part:

> "The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. . . ."

Plaintiff's contention-that his waiver of a jury trial was ineffective because it was not "entered in the record" due to the absence of a court stenographer-is unfounded. Plaintiff's uncontested waiver was entered in the record on several different occasions--in the District Court's memorandum decision (101a), and subsequently, in plaintiff's motion papers and affidavits (79a, 83a) and his brief on appeal to this Court (Plaintiff-Appellant's Brief, p. 29). Plaintiff hardly can be heard now to argue that his waiver was not entered in the record or otherwise not made in accordance with Rule 39.

Plaintiff's brief on appeal to this Court cited no authority, save only one oblique reference to Professor Wright's treatise, to support his request for withdrawal of his waiver of a jury trial. Plaintiff did not cite any judicial authority or allege any special facts or circumstances which would entitle him to reinstate his jury demand. The record, in short, discloses that plaintiff, in open court knowingly waived his demand for a jury trial,

that counsel for Chase consented to this waiver, and that the waiver subsequently was entered in the record. Wholly absent from the record is any "showing beyond mere inadvertence" sufficient to justify reinstatement of plaintiff's jury demand. Noonan v. Cunard Steamship Co., 375 F.2d 69, 70 (2d Cir. 1967). Although, as this Court noted, the judgment below may have resulted from a misunderstanding between the court and plaintiff's counsel, it cannot be said that plaintiff's waiver of his jury demand resulted from that "misunderstanding". Indeed, the fact is that plaintiff agreed to waive trial by jury well before the case was marked "submitted", rightly or wrongly, for final determination on the largely undisputed facts.

The rule is firmly established that a waiver, once made in accordance with Rule 39, is binding upon both parties and neither party may retract it unilaterally. "[W]here withdrawal is made with consent of the parties, the party withdrawing a jury demand cannot change his mind." 5 Moore's Federal Practice 344.2-344.3 (2d ed. 1974) "The mere fact that petitioner had changed his mind would not of itself require the court to set aside the procedural order made [to proceed non-jury]." West v. Devitt, 311 F.2d 787, 788 (8th Cir. 1963).

It is also firmly established that "where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held . . . to the legal consequences of such a waiver." Kearney v. Case, 79 U.S. 275, 284 (1870). See also Smith v. Cushman Motor Works, Inc., 178 F.2d 953, 954 (8th Cir. 1950); West v. Devitt, 311 F.2d 787 (8th Cir. 1963); Amburgey v. Cassady, 507 F.2d 728 730 (6th Cir. 1974); Chapman v. Kleindienst, 507 F.2d 1246, 1253 (7th Cir. 1974).

These principles were applied in a case similar to this one: General Business Services, Inc. v. Fletcher, 435 F.2d 863 (4th Cir. 1970). There, the defendant claimed that the case had been improperly tried non-jury. The complaint, defendant's answer, and the amended answer all demanded a jury trial. However, the subsequent final pretrial order recited that at the pretrial conference "[a]ll parties waived trial by jury" and ordered the case to be tried without a jury. By letter some five days after the pretrial conference, defendant stated that he understood the court would decide the issues of law but that a jury would decide the issue of damages. Nonetheless, the whole case was tried

non-jury. The Court of Appeals rejected defendant's claim that the case was improperly tried:

> "We see no error. The pretrial order recites a valid waiver of jury trial and once waived the subsequent demand was not timely. Rule 38, F.R.Civ.P. Subsequent to argument, we sought to obtain a transcript of the pretrial conference to determine if there was any basis to impeach or question the accuracy of the pretrial order. We are advised that a reporter was present but was not requested to take any notes. There is no basis, therefore, to go behind the pretrial order, or to corroborate any claim of misunderstanding on the part of the pro se defendant." 435 F.2d at 864.

Similarly, there is no basis for this Court to go behind the District Court's memorandum opinion reciting the fact that "[b]oth sides . . . decided to waive a jury." (101a) As the Court of Appeals observed in Doucet v. Wheless Drilling Co., 467 F.2d 336, 341 (5th Cir. 1972), in similar circumstances:

> He [the District Judge] was in a better position than we are to judge what respective counsel had in mind and whether anyone was injured. The record shows no objection by the defendant, no motion for continuance, and no inquiry to the court as to posture of the case."

In any event, plaintiff's waiver in this case is not disputed, and unlike Fletcher, in which the defendant appeared throughout pro se, plaintiff in this case was represented at the hearing by two attorneys.

In Amburgey v. Cassady, 507 F.2d 728 (6th Cir. 1974), the Court held that plaintiff had waived a jury trial under the following circumstances:

> "In the hearing conducted in connection with a motion to dismiss the complaint, when the district court suggested that a trial of the cause by jury would result in delay, counsel for plaintiff responded, "I'm not jumping up and down to try it before a jury, but I made the demand to protect myself, if it please the court, and I would like to get my case tried and I know it's a lot quicker to try before the court." This statement, coupled with counsel's commencement of the trial without objection before the court, constituted a waiver of the earlier demand for a trial by jury." 507 F.2d at 730.

This Court's decision in Heyman v. Kline, 456 F.2d 123 (2d Cir. 1972), is clearly distinguishable. There it was held that counsel's failure to respond to an offhand remark by Judge Timbers during the scheduling of a hearing to the effect that he intended to proceed non-jury did not amount to a waiver. Besides the passing nature of the Judge's remarks, the Court was persuaded by the fact that "the attorneys did not affirmatively agree" to the Judge's suggestion that the case be tried non-jury and by the fact that there was still time before a jury demand had to be made. Significantly, none of these factors is present in this case.

II

THE COURT OVERLOOKED THAT THE BETTER REMEDY WOULD HAVE BEEN ASSIGNMENT TO ANOTHER JUDGE.

The Court determined that plaintiff should be permitted to withdraw his waiver of a jury trial regardless of the technical merits of his Rule 39 argument because the District Court had already indicated its views on the factual questions to be tried. As shown above, such an alternative ignores the long-established principle under Rule 39 that a waiver once made should not be permitted to be withdrawn.

Withdrawal of the waiver is prejudicial both to defendant and to the District Court. Defendant would much prefer a simpler, less costly trial before a court which has the capability of understanding the complicated securities law issues presented. The District Court can handle a bench trial with greater facility and in less time than a jury trial.

It is therefore submitted that a recommendation by this Court that the action be assigned to another judge is a more appropriate remedy, which both will satisfy the Court's concern that Judge Duffy may have prematurely indicated his

views on the factual questions, but yet will not ignore the salutary principles of Rule 39.

Conclusion

Plaintiff is bound by his waiver of a demand for a jury trial in the court below. He did so apart from any purported misunderstanding between the court and counsel, on the basis of which this Court ordered vacatur and remand of the judgment below. Accordingly, this Court should grant a rehearing on its decision of March 1, 1976, and should modify so much of its decision as states that plaintiff should be permitted to withdraw his waiver of a jury trial. To the extent that it may be considered inappropriate for Judge Duffy to try factual questions on which he may already have indicated his views, the proper remedy is reassignment of the action to a different judge.

Respectfully submitted,

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WE CERTIFY that the foregoing petition is, in our opinion, well founded and not made for the purpose of delay.

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Dated: New York, N.Y.
March 15, 1976

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